A **BUKIT MELITA SDN BHD v. REVOLUSI RANCAK SDN BHD**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
MARY LIM JCA
B [CIVIL APPEAL NO: C-02(IM)-1442-07-2017]
6 DECEMBER 2019

CIVIL PROCEDURE: *Pleadings – Relief not pleaded – Damages – Prayer for damages abandoned – Whether High Court had power to award damages even*
C *though prayer for damages abandoned – Whether High Court seized with jurisdiction to order assessment of damages – Whether order on assessment of damages valid – Specific Relief Act 1950, s. 18*

The appellant ('first defendant') sold three pieces of land ('properties') to the
D respondent ('plaintiff'). The first defendant, unilaterally and without the plaintiff's consent, amended the sale and purchase agreement ('SPA') but, at the same time, accepted and encashed the cheques issued by the plaintiff to confirm that the parties had agreed on the SPA. When the SPA was returned, the plaintiff, upon realising the amendments, protested and disagreed with them. The present appeals stemmed from the first defendant's refusal to
E transfer the said properties to the plaintiff despite the High Court's order of specific performance of the original SPA and unsuccessful suits and appeals. Due to the defendant's resistance, the plaintiff finally filed an application at the High Court for, among others, vacant possession, original title of the properties and assessment of damages ('encl. 54'). The High Court allowed
F encl. 54. One of the prayers allowed in encl. 54 was for damages even though the plaintiff had, in fact, abandoned the said prayer when it amended its statement of claim. The plaintiff then proceeded to file a notice of appointment for assessment of damages ('encl. 78'). After encl. 54 was granted, the first defendant filed the applications (i) to examine the
G accountant who prepared the plaintiff's estimated loss reports ('encl. 87'); (ii) for extension of time to file an affidavit of opposition to the plaintiff's application for assessment of damages ('encl. 97'); and (iii) for a declaration that the plaintiff was liable for a late payment of RM2,639,165.06 as the plaintiff had yet/refused to pay the balance of the purchase price to the first
H defendant despite having received vacant possession of the properties ('encl. 98'). The plaintiff, on the other hand, filed encl. 103 for (i) a court order for the first defendant to release the remaining purchase price of RM8,187,915.56 to the first defendant after deducting the assessed damages together; and (ii) the caveat entered by the first defendant on the properties be immediately removed. Having heard all the applications together, the
I High Court allowed encls. 78 and 103 and dismissed encls. 87, 97 and 98. Hence, the present appeals.

Held (allowing appeals against encls. 78 and 103; dismissing appeals against encls. 87, 97 and 98)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) The plaintiff had abandoned the prayer on damages when it had the statement of claim amended in the course of pleadings. The court granting the order has the power to award damages if it is of the opinion that merely granting the specific performance is inadequate as to constitute a remedy to the plaintiff's claim. However, the exercise of that power, provided under s. 18(3) of the Specific Relief Act 1950 ('SRA'), must be predicated upon the fact that there must be a specific prayer asking for damages in addition to the prayer for specific performance. The deficiency in the pleadings, in that regard as to damages, could not be saved by the catch-all clause that states 'Any order as the court deems fit' or any clause differently worded but having the same intended effect. (paras 24-26)

(2) The court, in ordering for assessment of damages by allowing encl. 54, had acted in a manner where in fact it was wanting in jurisdiction when it had so granted that prayer for assessment of damages. The High Court had given an order to a party who did not ask for such a prayer. In other words, the High Court was not clothed with the necessary jurisdiction to make any order in respect of assessment of damages when, in fact and in law, the plaintiff did not pray for such a relief. It was not seized of any jurisdiction in that regard. The effect of such an act by the High Court was that such order, on assessment of damages, was null and void. Section 18 of the SRA could not, in the circumstances, assist the plaintiff. However, such lack of jurisdiction was only limited to the issue of assessment of damages. The rest of the order in encl. 54 remained good and proper. (paras 27 & 28)

(3) Since there was no prayer for damages in the first place by the plaintiff, there existed no legal basis for the High Court to grant an assessment of damages when it granted encl. 54. That being the case, there was also no basis for the High Court to deal with, and grant, the various applications filed by both parties in relation to encl. 76 which was filed by the plaintiff as a purported consequence of the order granted in encl. 54. (paras 34 & 35)

Case(s) referred to:
Director of Public Prosecutions v. Head [1959] AC 83 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***
London & Clydeside Estates Ltd v. Aberdeen District Council & Anor [1980] 1 WLR 182 ***(refd)***
NZ New Image Sdn Bhd v. Loh Yok Liang [2016] 9 CLJ 474 CA ***(refd)***
Pow Hing & Anor v. Registrar of Titles, Malacca [1980] 1 LNS 120 FC ***(refd)***
Regina v. Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2) [1966] 1 QB 380 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18 r. 19
Specific Relief Act 1950, s. 18(3)

For the appellant - Wong Guo Bin & Mah Sue Ann; M/s lzral Partnership
For the respondent - Gerald Samuel & Jason Chan Wa Chiang; M/s S Mathews & Assocs

[Editor's note: For the High Court judgment, please see Revolusi Rancak Sdn Bhd lwn. Bukit Melita Sdn Bhd & Satu Lagi [2017] 1 LNS 1501 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Abang Iskandar JCA:

Brief Facts

[1] In early 2009, Bukit Melita Sdn Bhd ("the first defendant") had agreed to sell to Revolusi Rancak Sdn Bhd ("the plaintiff"), three pieces of land in Bentong, Pahang at the price of RM2,585,362, RM2,598,362 and RM3,402,750 respectively.

[2] The plaintiff had paid an 'earnest deposit' to the first defendant for each of the properties, amounting to RM51,707.24, RM51,967.24 and RM68,055 respectively. The total sum paid as earnest deposits was RM171,729.40 leaving the balance purchase price of RM8,207,915.56 to be paid.

[3] The sale and purchase agreement ("S&P") was signed on 16 June 2009. The first defendant, through his solicitor unilaterally and without the consent of the plaintiff, made amendments to the S&P. However, at the same time, it accepted and encashed the cheques issued by the plaintiff (as earnest deposits) to confirm that the S&P had been agreed upon by both parties and would be executed by the first defendant.

[4] The amended S&P was then returned to the plaintiff. Upon realising the unilateral amendment, the plaintiff protested and disagreed with the unilaterally amended S&P. The plaintiff then filed an action in the High Court at Temerloh in Civil Suit No. 22-12-Year 2010 ("Suit 2010") demanding, among others, for the specific performance of the original S&P.

[5] On 21 September 2011, the High Court of Temerloh ordered, among others, specific performance, that the first defendant was to complete the sale of the three pieces of land to the plaintiff. The court also decided that the parties were bound by the original S&P and ordered the first defendant's director to transfer the properties to the plaintiff ("the judgment").

[6] Aggrieved by the judgment, the first defendant had filed an appeal against the judgment at the Court of Appeal. However, the appeal was dismissed on 9 September 2013. The application for leave to appeal to the Federal Court was also dismissed on 29 April 2014.

[7] Despite the fact that the court had ordered the specific performance of the original S&P and that the first defendant had exercised all rights of appeal, still the first defendant failed to execute the S&P and transfer the properties to the plaintiff. Hence, the plaintiff had requested the S&P to be executed by the Deputy Registrar on behalf of first defendant on 8 May 2012.

[8] Still dissatisfied with the judgment, the first defendant then filed a new suit at the Kuala Lumpur High Court no. 22NCVC-30-01-2015 ("Suit 2015") claiming for among others, a declaration that Suit 2010 is to be set aside and is not binding on the first defendant and/or its Directors on the ground that the plaintiff has been late and out of time to execute the S&P. However, Suit 2015 was dismissed on 15 June 2015 under O. 18 r. 19 Rules of Court 2012.

[9] The first defendant appealed to the Court of Appeal. However, the appeal was dismissed on 9 March 2016. Despite the above-mentioned facts, the first defendant still refused to complete the sale and transfer of the properties to the plaintiff.

[10] The plaintiff had on 25 August 2015 filed an application *vide* encl. 54, applying for among others, vacant possession and original title of the properties for the failure of the first defendant to comply with the judgment. The plaintiff also applied for an order for an assessment of damages *vide* the encl. 54.

[11] At the same time, the first defendant had engaged a new solicitor to act on its behalf. The new solicitor agreed with the plaintiff's application in encl. 54. Thus, the High Court had granted the plaintiff's application in terms as prayed in encl. 54 on 12 February 2016. One of the prayers that was allowed was for the damages to be assessed, with costs of RM3,000.

[12] On 2 June 2016, the plaintiff filed a notice of appointment for assessment of damages (encl. 78). The first defendant had submitted the original titles of the properties to the plaintiff's solicitor on 13 July 2016. Hence, the plaintiff claimed damages for the period from 8 August 2012 (the original completion date of the S&P) until 13 July 2016.

[13] After encl. 54 was granted, the first defendant for the fifth time engaged a new solicitor to handle its case. The first defendant had, thereafter, filed applications *vide* encls. 87, 97 and 98, in response to encl. 78.

[14] Enclosure 87 is the first defendant's application to examine one Selva Rasan a/l Puspa Das from Messrs Selva & Associates, a qualified accountant who prepared the plaintiff's estimated loss report. The report was disputed on the grounds that the validity of the information contained in the report by Selva Rasan was based on assumptions and speculations and the land was not planted with any crops when the original S&P was prepared on 16 June 2009. The sale of land is just an "as and where is basis".

[15] Enclosure 97 is the first defendant's application for extension of time to file an affidavit of opposition to the plaintiff's application for assessment of damages.

[16] Enclosure 98 is the first defendant's application for a declaration that the plaintiff is liable for a late payment of RM2,639,165.06 as the plaintiff has yet/refused to pay the balance of the purchase price to the first defendant despite having received vacant possession of the properties. Therefore, the court ought to set aside the transfer of ownership of the properties to the plaintiff and shall make order that the properties be transferred to the first defendant.

[17] The plaintiff had, on the other hand, filed encl. 103 for a court order for the plaintiff to release the remaining purchase price of RM8,187,915.56 to the first defendant within seven days from the date of this order after deducting the assessed damages together with interest, costs and that the caveat entered by the first defendant on the properties to be immediately removed.

Findings Of High Court

[18] All applications were heard together before the same learned Judicial Commissioner of the High Court ("JC") on 6 June 2017. The learned JC had made the following decisions:

(a) The first defendant's applications in encls. 87, 97 and 98 were dismissed with costs of RM6,000 for each application to be paid by the first defendant to the plaintiff.

(b) The plaintiff's applications in encls. 78 and 103 were allowed with costs of RM5,000 for each enclosure to be paid by the first defendant to the plaintiff.

[19] Dissatisfied with the above decisions, the first defendant filed five separate appeals for each of the enclosures above-mentioned respectively, to the Court of Appeal.

The Appeals

[20] We heard all these five appeals on 23 April 2018 and continued the hearing on 7 June 2018, having also considered further submissions by parties. After perusing the records of appeal and considering submissions from both parties, we made the following decisions:

Court of Appeal No.	Enclosure:	Application and Court of Appeal's Decision
C-02(IM)-1438-07/2017	(Encl. 103).	Plaintiff's application to release the balance of purchase price in the sum of RM8,187,915.56 to the 1st Defendant within seven days from the date of this Order after deducting the damages amounting RM1,707,593.50. *Court: Appeal allowed. Respondent (Plaintiff) to return the amount of RMI,707,593.50 within 20 days form today's date. Prayer (a) of the Order (for Application in Encl. 103) is set aside. No order as to cost. Costs in the High Court to be refunded to the Appellant (Defendant).*
C-02(IM)-1439-07/2017	(Encl. 98)	1st Defendant's application for among others, a declaration that the Plaintiff is liable for late payment interest in the sum of RM2,639,165.06 and Plaintiff's conduct of countermanding and stopping payment of the cheque amounts to a repudiation of the 2012 Agreement and 2016 Order is dismissed with cost of RM6,000.00. *Court: Appeal is struck out with no liberty to file afresh. No order as to costs. Costs in the High Court to be refunded to the Appellant (Defendant). Deposit refunded.*
C-02(IM)-1440-07/2017	(Encl. 97)	1st Defendant's application for extension of time to file its Affidavit to Oppose the Plaintiff's Assessment of Damages Application is dismissed with costs of RM6,000.00 to the Plaintiff. *Court: Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the Appellant (Defendant).* *Deposit refunded.*

C-02(IM)-1441-07/2017	(Encl. 87)	1st Defendant's application for an order that Messrs Selva & Associates, accountant for the Plaintiff to be produced to the court to be cross-examined on his report dated 20 July 2016 is dismissed with costs of RM6,000.00 to the Plaintiff. *Court: Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the Appellant (Defendant). Deposit refunded.*
C-02(I M)-1442-07/2017	(Encl. 78)	Plaintiff's Notice for Assessment of Damages – 1st Defendant to pay the Plaintiff the sum of RM1,707,593.50 and costs of RM5,000.00. *Court: Appeal allowed. The order of the High Court in respect of assessment of damages (Encl. 78) is set aside. No order as to costs. Costs in the High Court to be refunded to the Appellant (Defendant). Deposit refunded.*

[21] These are now our grounds for having so decided.

[22] Just as a brief recap, before us, parties agreed to deal with appeal C-020M)-1442-07-2017 which was concerned with encl. 78 ie, the plaintiff's notice for assessment of damages. The basis of the application is that the first defendant had delayed in delivering up vacant possession of the lands. The first defendant contended that it was not guilty of any delay as the plaintiff did not pay the balance of purchase price pursuant to the S&P executed in 2009. The first defendant also contended that the JC erred in law and/or fact in awarding the damages to the plaintiff as the plaintiff did not suffer any loss. Further, the first defendant submitted before us that the plaintiff would be unjustly enriched if assessment of damages is allowed.

[23] The plaintiff conceded that the quantum of the assessment could be contested but the basis and correctness for ordering the assessment has merged with 12 February 2016 Order and is caught by *res judicata*. For clarity on the issue, we reproduce below the written submission by plaintiff, like so:

12. In the light of the above, we humbly submit that it would contravene the principle of *res judicata* if the correctness of Enclosure 54 is now re-opened and re-examined by this Honourable Court when it was not appealed against in the first place. This would result in chaos in litigation. The cases on *res judicata* are replete. For convenience we will merely refer to the Federal Court's decision in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74:

> The law, as I understand it, is that the defendant is precluded from filing a second application in respect of a matter which was directly and substantially in issue in the earlier application (Enclosure 9) in this very court. If a decision has been given with respect to a matter or part of a matter in controversy between the parties by a court of competent jurisdiction it remains binding in the subsequent stages of the same proceedings in the same court and cannot be re-opened in that court. In my view **an erroneous decision irrespective of whether it is on a question of law or fact operates as *res judicata* between the parties to it.** (emphasis added).

(See the Respondent's Outline Submission at page 5 paragraph 12.)

[24] To our minds, the issue as to the propriety, if not the legality of the order ordering an assessment of the damages is not caught by *res judicata*. We took the view that the order granting the application by the plaintiff in encl. 54 in respect to it allowing for an assessment of damages as an order that was granted for want of jurisdiction. We had so found, because it was not disputed that the plaintiff had in fact abandoned the prayer on damages when it had the statement of claim amended in the course of pleadings.

[25] As regards the application of s. 18 of the Specific Relief Act 1950 ("the SRA 1950") it was contended that the court granting the order has the power to award damages if it was of the opinion that merely granting the specific performance was inadequate as to constitute a remedy to the plaintiff's claim. We had occasion to peruse through the authorities cited to us on this issue, and with respect, we were in agreement with learned counsel for the first defendant that the exercise of that power, as stipulated under s. 18(3) of the SRA 1950, must be predicated upon the fact that there must be a specific prayer asking for damages in addition to the prayer for specific performance. In the regard, we would refer to the decision of this bench in the case of *NZ New Image Sdn Bhd v. Loh Yok Liang* [2016] 9 CLJ 474 ("*NZ New Image*") where it was held that:

> [33] Section 18 of the Specific Relief Act 1950 does not give the appellant freedom to act as they wish for it clearly stipulates, and we say that learned counsel did not seem to realise, that a person "may also ask for compensation" for the breach of contract which means therefore that the appellant must necessarily pray for the compensation in the statement of claim if it is intended that the appellant wishes to also seek for damages. In fact, illustrations provided in s. 18(2), (3) and (5) plainly show that the

A plaintiffs sue for specific performance and for compensation, which was not the case here. Reference in this connection is made to O. 81 r. 1(1)(a) of the Rules of Court 2012 which clearly envisages a situation where an action for specific performance may be begun with or without an alternative claim for damages (*Insofex Sdn Bhd v. Labasama Group (M) Sdn Bhd (No. 2)* [2000] 6 CLJ 97). Accordingly, where a person wishes to claim
B for damages, he would have to do so by way of an alternative claim for damages. Or he can otherwise sue for specific performance only. In the present appeal, the essence of the appellant's claim in the circumstances of the case was for specific performance only. They did not seek the alternative remedy of damages *in lieu* of specific performance.

C **[26]** We also would agree that the deficiency in the pleading in that regard as to damages, could not be saved by the catch-all clause that states, "Any order as the court deems fit" or any clause differently worded but having the same intended effect.

[27] As such, the court in ordering for assessment of damages in allowing
D encl. 54 had acted in a manner where in fact it was wanting in jurisdiction when it had so granted that prayer for assessment of damages. The learned JC had given an order to a party who did not ask for such a prayer. Indeed, as it had come to pass, the plaintiff had abandoned that particular prayer for damages when it amended its statement of claim dated 12 April 2011 before
E pleadings were closed, by deleting para. 27 xii. (See, Penyata Tuntutan Terpinda Semula, para. 27 xii). In other words, the JC was not clothed with the necessary jurisdiction to make any order in respect of assessment of damages, when in fact and in law, the plaintiff did not pray for such a relief. It was not seized of any jurisdiction in that regard. The effect of such an act
F by the court is that such order on assessment of damages is null and void. Section 18 of the SRA 1950 could not in the circumstances assist the plaintiff in that regard.

[28] However, we must be quick to add that such lack of jurisdiction was only limited to the assessment of damages issue. The rest of the order
G pertaining to encl. 54 would, with respect, remain good and proper. We saw no reason to disturb the rest of the order of the learned JC apart from the impugned order made on the assessment of damages. We reproduce the order of the learned JC when granting encl. 54, as follows:

... ADALAH DIPERINTAHKAN bahawa:

H

(a) Pendaftar Hakmilik Negeri Pahang mendaftarkan Plaintif sebagai pemilik berdaftar Geran No. 6927, Lot 2187, Mukim Sabai, Daerah Bentong, Negeri Pahang ("Hartanah Pertama"), Geran No. 9725, Lot 2186, Mukim Sabai, Daerah Bentong, Negeri Pahang ("Hartanah Kedua") dan Geran No. 6171, Lot 2215, Mukim Sabai, Daerah Bentong, Negeri
I Pahang ("Hartanah Ketiga") (secara kolektifnya sebagai "Hartanah-hartanah tersebut") dalam masa 7 hari dari tarikh serahan Perintah ini;

(b) Defendan Pertama menyerahkan milikan kosong dan hakmilik asal Hartanah-hartanah tersebut kepada Plaintif dalam masa 7 hari dari tarikh Perintah ini;

(c) Peguamcara Plaintif melepaskan baki harga belian untuk Hartanah-hartanah tersebut sebanyak RM8,207,915.56, butir-butir seperti di Lampiran A di sini kepada Defendan Pertama dalam masa 7 hari selepas (a) dan (b) dipatuhi;

(d) *Satu pentaksiran ganti rugi atau di pilihan Plaintif suatu akaun keuntungan dan pembayaran kepada Plaintif kesemua jumlah wang yang didapati perlu dibayar setelah mengambil siasatan tersebut akibat daripada kelewatan Defendan Pertama untuk melaksanakan perjanjian jual beli bertarikh 8-5-2012 untuk Hartanah-hartanah tersebut;* dan

(e) Kos sebanyak RM3,000.00 dibayar oleh Defendan Pertama kepada Plaintif. (emphasis added).

[29] As to its effect, we were of the considered view that a null and void order need not be acted upon by the party against whom it was meant to operate. He would not need not to act upon it. He would not need to appeal against it. He may even attack it collaterally, if such a need arises.

[30] We found support in our view in the decision of the Federal Court in the case of *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21 ("*Eu Finance* case") which decision was subsequently approved *in toto* by the Privy Council. Abdoolcader J sitting on the Federal Court Bench and speaking on its behalf, has said the following:

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon? (*sic*) in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a Law Lord) said (at page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' (*Birmingham (Churchwardens and Overseers) v. Shaw* (1849) 10 QB 868, 880; 116 ER 329 (at page 880 per Denman CJ)). In *Barnard v. National Dock Labour Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension

made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton LJ). *Ridge v. Baldwin* [1964] AC 40 is to the same effect.

Lord Denning said in *Director of Public Prosecutions v. Head* [1959] AC 83 (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v. Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380, 402 (at page 402). The judgment of this court in *Pow Hing & Anor v. Registrar of Titles, Malacca* [1981] 1 MLJ 155, 157 refers (at page 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor* [1980] 1 WLR 182, 189 and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

[31] Applied the principle on nullity as expounded in the *Eu Finance* case (*supra*) to the factual scenario in this case, when the proprietary of the assessment of damages was being challenged on the ground that it was granted for want of jurisdiction, and it was indeed established that the plaintiff had in fact abandoned the claim for damages when it amended the statement of claim, the order for assessment had been rendered null and void as there was no legal basis upon which the learned JC could have made such an order, for the simple reason that there was no prayer for damages by the plaintiff in the first place. The JC was devoid of jurisdiction in respect of that matter.

[32] Given that factual circumstance, it was open for the assessment of damages order to be challenged as to its legality and be subjected to legal scrutiny it deserved, and be treated accordingly henceforth.

[33] Having considered the further submissions of both parties by respective learned counsel, we respectfully agreed with the first defendant that the order for assessment of damages was made for want of jurisdiction. It was a nullity and as a nullity, it could be ignored, or it could be attacked collaterally whenever it was intended to be used against the adverse party, in this case, against the first defendant. On the authority of *Eu Finance* (*supra*) case it was open to the first defendant to challenge it when encl. 78 was filed by the plaintiff for orders it deemed necessary to effectuate the impugned

order of assessment. Abdoolcader J said: "... it can be disregarded and impeached in any proceedings, *before any court or tribunal and whenever it is relied upon? (sic) in other words, it is subject to collateral attack*." (emphasis added). Again, Denning MR had stated in the case of *Director of Public Prosecutions v. Head* [1959] AC 83 (at p. 111) that "if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado." The learned Master of the Rolls had repeated his view on the same issue in the case of *Regina v. Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380. Lord Hailsham of Marylebone, LC also had occasion to express his opinion on the effect of a nullity and said: "the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own." (See the case of *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor* [1980] 1 WLR 182. As if to reemphasise the point, Abdoolcader J again reiterated his view on the matter in the case of *Pow Hing & Anor v. Registrar of Titles, Malacca* [1980] 1 LNS 120; [1981] 1 MLJ 155, wherein he cited with approval the speech by Lord Hailsham of Marylebone in the *London & Clydeside Estates Ltd* (*supra*).

Our Findings

[34] Premised upon the above, it was clear that the learned JC had made an order for an assessment of damages for want of jurisdiction, that it was in actuality a nullity. Since there was no prayer for damages in the first place by the plaintiff, there existed no legal basis for the learned JC to grant the order for an assessment of damages when he granted encl. 54.

[35] That being the case, there also was no basis for the learned JC to deal with and grant the various applications filed by both parties in relation to encl. 76 which was filed by the plaintiff as a purported consequence of the order granted on the assessment of damages in encl. 54.

Conclusion

[36] In the circumstances, we had thus made the following orders:

Appeal 1438 – Appeal allowed. Respondent to return the amount of RM1,707,593.50 within 20 days from today's date. Prayer (a) of the order (for application in encl. 103) is set aside. No order as to costs. Costs in the High Court to be refunded to the appellant.

Appeal 1439 – Appeal is struck out with no liberty to file afresh. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1440 – Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1441 – Appeal is struck out with liberty to raise the issue therein at the Federal Court and/or Court of Appeal. No order as to costs. Costs in the High Court to be refunded to the appellant. Deposit refunded.

Appeal 1442 – Appeal allowed. The order of the High Court in respect of assessment of damages (encl. 78) is set aside. We made no order as to costs. Costs in the High Court to be refunded to the appellant. Deposit, if any paid, to be refunded to the appellant.